BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID L. HUNTER Claimant VS. **MOBILE HOME LIVING, INC.** Respondent AND **UNION INS. CO. OF PROVIDENCE** Insurance Carrier	)	Docket No. 1,054,542

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 17, 2011, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Brian D. Pistotnik, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to meet his burden of proving that his condition arose out of and in the course of his employment with respondent and also that claimant failed to give respondent timely notice of his injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 17, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's findings that he did not prove his condition arose out of and in the course of his employment with respondent and that he did not give respondent timely notice of his injuries.

Respondent argues that claimant did not meet his burden of proving he suffered accidental injury that arose out of and in the course of his employment or that he provided respondent with timely notice of any work-related accident.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury or injuries that arose out of and in the course of his employment at respondent?

(2) If so, did claimant give respondent timely notice of his accidental injury or injuries?

FINDINGS OF FACT

Claimant worked for respondent for about 18 months doing maintenance work. He described his job tasks as picking up and dumping trash, picking up debris, cutting up tree limbs, shoveling snow, mowing grass, digging holes and waterlines, and doing plumbing work. Respondent consists of two mobile home parks with about 400 mobile homes. Claimant first started noticing symptoms in his left arm and shoulder in June or July 2010, and he sought treatment from his personal physician, Dr. Brian Comer. At all times, claimant's personal health insurance paid for the expenses of his medical treatment. Claimant was told that he had pulled muscles in his shoulder over time. Eventually the pain moved up his neck and down into the back part of his shoulder and he had trouble raising his arm. Dr. Comer referred claimant to an orthopedic specialist, Dr. Ryan Livermore. Claimant continued to work because he was afraid if he took off he would lose his job. As he continued working, he noticed that his symptoms worsened.

Claimant testified that Dr. Livermore gave him a slip saying if he had surgery on his shoulder, he would be off work for six months.[1] Claimant said he gave the slip to Wendy Tyrell, respondent's community manager, and told her the treatment was to his shoulder. He did not specifically say the treatment was connected to his work duties, but he thought she knew because he had gone to the doctor and was taking Lortabs for the pain. He thought that by showing Ms. Tyrell the slip from Dr. Livermore, his injuries were being documented. Claimant did not have the surgery, which had originally been scheduled for November 5, 2010, because he did not want to lose time from work over the holidays and because he was having problems with his marriage at the time.

Claimant said he began having right leg pain when he twisted his leg while picking up a couch at work. He went to see Dr. Comer and was given a knee brace. Dr. Comer's medical note of December 3, 2010, indicates that "while lifting something into his truck, he

[1] Dr. Comer's medical records of September 24, 2010, indicate that claimant had an appointment with Dr. Livermore on October 4, 2010.

[claimant] turned his knee and felt a give in the back of his right knee."[2] The note does not indicate that the incident occurred while claimant was working, but claimant testified the only truck he had was the company truck.

Claimant testified that for the last year he worked for respondent, a coworker helped him with his duties because he could not lift with his left arm. Claimant testified he told his coworker that the problems with his shoulder were a result of the strenuous lifting he did at work. Claimant also said he told Mike Tyrell[3] that his shoulder was hurting from the strenuous work in the mobile home parks, but Mr. Tyrell was not claimant's supervisor. Claimant's supervisor was Larry Cantrell, and claimant admitted he did not tell Mr. Cantrell about his alleged injuries. Nor did he tell Mr. Womack, respondent's owner.

Claimant's last day at work for respondent was either January 28 or 29, 2011. He terminated his employment for reasons not connected to his physical injuries. After his termination, claimant attempted to call Wendy Tyrell to ask for workers compensation, but she would hang up the phone and not talk with him. Claimant's attorney mailed a certified letter to respondent dated February 14, 2011, enclosing a copy of claimant's form K-WC E-1, Application for Hearing. The Application for Hearing alleged a series of accidents "[e]ach and every working day from 7/01/10 through last day worked 1/28/11" caused by "[r]epetitive lifting/lifting trash can" with injuries to his "[n]eck, left shoulder and right leg." The letter was received by respondent on February 15, 2011.

On February 22, 2011, Dr. Comer wrote a letter "To Whom It May Concern" indicating that claimant "suffered a rotator cuff tear injury while working for Lamplighter."[4] The letter indicates that claimant would need to be off work six months but then he would be able to return to work full time. Nowhere else in Dr. Comer's records is there an indication that claimant's left shoulder or right leg problems were caused by the work at respondent. Dr. Comer's records note that x-rays of claimant's right shoulder taken July 30, 2010, showed "marked AC joint arthritis and glenohumeral joint narrowing."[5] An MRI done on August 30, 2010, however, showed claimant had a rotator cuff tear. There is no indication in the records that claimant told Dr. Comer he had any problem with his neck.

Ms. Tyrell testified that she is respondent's community manager. She manages the park, writes letters and collects rent. She testified that at no time did claimant report to her that he had an injury to his shoulder, neck or leg while working for respondent. She

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[2] P.H. Trans., Cl. Ex. 3 at 15.

[3] Mr. Tyrell is Wendy Tyrell's husband. P.H. Trans. at 21.

[4] P.H. Trans., Cl. Ex. 1.

[5] P.H. Trans., Cl. Ex. 3 at 26.

admitted that claimant gave her a note, but she thought it contained information about a possible heart problem. She gave the note to Mr. Cantrell, claimant's supervisor.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

K.S.A. 2010 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of

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[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

> injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

At the preliminary hearing, counsel for claimant announced to the court that claimant was seeking medical treatment for his shoulder. Accordingly, for purposes of this appeal, the Board is not concerned with claimant's allegation of injuries to his neck and right leg.[11]

Claimant testified that he began to notice symptoms in his left shoulder in June or July 2010. He continued to work, and his symptoms worsened. Claimant attributes his left shoulder injury and aggravations of that condition to his regular job duties with respondent. Claimant's job consisted of manual labor activities and included heavy lifting, pushing, pulling, and reaching above shoulder level. Dr. Comer diagnosed claimant with a rotator cuff tear injury, which the doctor attributed to claimant's work at "Lamplighter." It appears undisputed that "Lamplighter" is the same employer as the respondent. There is no contrary evidence. Respondent points to the absence of any mention of work causing claimant's injury in the contemporaneous medical treatment records, together with the fact that claimant never reported his injury as work related during his period of employment with respondent and the fact that he sought treatment on his own and had that treatment billed to his personal insurance carrier, as evidence that claimant's injury is not work related. This Board Member agrees that those factors weigh against claimant's testimony. However, given the causation opinion by Dr. Comer that claimant's shoulder injury is work related, this Board Member finds that claimant has proved he suffered personal injury by a series of accidents that arose out of and in the course of his employment with respondent.

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2010 Supp. 44-555c(k).

[11] P.H. Trans. at 4.

Turning now to the issue of notice, the timeliness of claimant's notice turns on the date of accident. K.S.A. 2010 Supp. 44-508(d) provides a methodology for determining date of accident in cases where, as here, the accident occurred as a result of a series of events, repetitive use, cumulative traumas or microtraumas. Claimant did not have an authorized physician. Therefore, he was never taken off work or restricted by an authorized physician. Dr. Comer related claimant's rotator cuff tear injury to his employment in his letter of February 22, 2011. This was after claimant gave respondent written notice of his accident by the letter dated February 14, 2011. That letter was received by respondent on February 15, 2011, and, pursuant to K.S.A. 2010 Supp. 44-508, that is the date of accident. This Board Member is mindful of the fact that February 15, 2011, is after claimant's last day of working for respondent, but our Court of Appeals has held that for purposes of notice, the date of accident can be after the last day worked.[12]

CONCLUSION

(1) Claimant sustained personal injury to his left shoulder by a series of accidents that arose out of and in the course of his employment with respondent.

(2) Claimant's notice to respondent on February 15, 2011, was within 10 days of his date of accident and was, therefore, timely.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated March 17, 2011, is reversed and this matter is remanded to the ALJ for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[12] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275 (2009), *rev. granted* May 18, 2010, *pending*.